

DECISION RECORD

DIVISION:	Migration & Refugee Division
REVIEW APPLICANT:	Mr Mohammad Reza Hayderi
VISA APPLICANTS:	Miss Nazanin Hayderi Mr Nawid Hayderi
CASE NUMBER:	1509103
DIBP REFERENCE(S):	OSF2014/029615
MEMBER:	Kate Millar
DATE:	3 March 2016
PLACE OF DECISION:	Adelaide
DECISION:	The Tribunal remits the applications for Partner (Provisional) (Class UF) visas for reconsideration, with the direction that the first named visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa: • cl.309.211 of Schedule 2 to the Regulations.

STATEMENT MADE ON 03 MARCH 2016 AT 3:47PM

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. Mr Hayderi is a permanent resident of Australia, having migrated to Australia as a dependent of his sister. He says he married Miss Hayderi, a citizen of Afghanistan, in 2010 in an arranged marriage and that Nawid Hayderi is his son. Miss Hayderi and Nawid applied for a Partner (Provisional) (Class UF) visas to join Mr Hayderi in Australia on 21 July 2014.
2. A delegate of the Minister for Immigration and Border Protection refused their visa applications because the delegate was not satisfied Mr Hayderi and Miss Hayderi were spouses as defined by the *Migration Act 1958* (the Act). In particular, the delegate was not satisfied that they were married because the marriage certificate and the statements of the parties say they married on a date when Mr Hayderi was in Australia and Miss Hayderi was in Afghanistan.
3. The Miss Hayderi and Nawid applied for Class UF visas, and the only subclass of this type is a Subclass 309 (Partner (Provisional)) visa. The criteria for the grant of this visa are set out in Part 309 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The requirement to be the spouse or defacto partner of an Australian citizen or permanent resident at the time of the visa application is contained in cl.309.211 of Schedule 2 of the Regulations. Miss Hayderi needs to meet the primary criteria for the grant of the visa, and Nawid need only meet the secondary criteria for the grant of the visa. The primary criteria include cl.309.211(2) which requires Miss Hayderi to be the spouse or defacto partner of Mr Hayderi.
4. Mr Hayderi appeared before the Tribunal on 10 December 2015 to give evidence and present arguments. The Tribunal also received oral evidence from Miss Hayderi. The tribunal was assisted by an interpreter in the Hazaragi and English languages.
5. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

6. The issue in the present case is whether Miss Hayderi is the spouse of Mr Hayderi.

WHETHER THE PARTIES ARE IN A SPOUSE OR DE FACTO RELATIONSHIP

7. Clause 309.211(2) and 309.221 require that at the time the visa application was made, and at the time of this decision, Miss Hayderi is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. Miss Hayderi says she is the spouse of Mr Hayderi who is an Australian permanent resident.
8. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. People in a married relationship must:
 - be married to each other under a marriage that is valid for the purposes of the Act,
 - there must be a mutual commitment to a shared life as husband and wife to the exclusion of all others,
 - the relationship must be genuine and continuing;

- and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d).

9. In forming an opinion as to these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and review applicant's household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision.

ARE THE PARTIES VALIDLY MARRIED?

10. If the parties are validly married, they may meet the requirements of a spousal relationship, but not a de facto relationship.
11. In the visa application, Mr Hayderi and Miss Hayderi claim to have become engaged on 1 January 2010 and married on 28 September 2010. These dates are replicated in statements provided by both parties. This date also appears in the marriage certificate provided by Miss Hayderi. Mr Hayderi was in Australia on 28 September 2010, and as a result, the delegate was not satisfied they were married.
12. In his application to the tribunal, Mr Hayderi said that they made a mistake with their wedding date in the visa application. He says the mistake was by the marriage registration office and not by them, as the local marriage office gave the date Miss Hayderi asked for the marriage certificate and not the date they were married. He says they were married on 4 May 2010. He provided a handwritten marriage certificate. The translation of the documents has the document dated 4 May 2010. The translation also states it was signed 4 May 2015.
13. Mr Hayderi said that after he married in Afghanistan he came back to Australia and put in the visa application. He says he was told a local marriage certificate was not acceptable and they needed an official marriage certificate. He says Miss Hayderi went to get the marriage certificate and it was dated on the date she requested it. The visa application was lodged 21 July 2014, a considerable time after September 2010. It also does not match the date of the marriage certificate, which is 25 August 2013. Mr Hayderi said that he went to a legal service when he returned from Afghanistan in August 2010 and went to a legal service, but that he could not lodge the visa application because he did not have enough money.
14. Nawid is stated to have been born on 30 December 2010. Nawid's date of birth appears on a birth registration card from Isteqlal Hospital. The original and a translation were provided to the tribunal. The statutory declarations in support of the relationship note that the parties have a child and it was unusual to have a child and not be married in Afghanistan. Nawid was born approximately seven months after the revised marriage date, but approximately nine months after Mr Hayderi arrived in Afghanistan.
15. There is an ongoing problem with documents in this matter. For example, Mr Hayderi's written statement provided to the department says that he married on 28 September 2010. He says this date is wrong, however it is written in his own statement, Miss Hayderi's statement and in the visa application form.
16. Another example is inconsistency in the marriage proposal being observed, in that Miss Hayderi's written statement in support of the application, she says Mr Hayderi's parents came and asked her parents for her hand in marriage. Mr Hayderi said that his English is not good and he talked to someone about this and talked that my family went to the house. He says the person he talked to, and presumably who wrote the statement, did not now he did not have parents. He said he could not read the statement so he did not know what was in it.

17. Mr Hayderi said the visa application was filled in by a person he lived with, Mr Hanif Prizwani. The visa application itself says Mr Hayderi assisted Miss Hayderi with the form. Mr Hayderi says he works as a driving instructor, and has worked in this role since 2011 or 2012. On being asked if he needs to read and write in this job, he said "not much". He says he does not test people for their driver's license.
18. Mr Hayderi said that the marriage was an arranged marriage and his sister knew Miss Hayderi's mother. He says his sister made arrangements for him to speak to Miss Hayderi on the telephone and then he went to Afghanistan to be married. He said he could not remember how long he was in Afghanistan before he was married and thought maybe two or three months. Miss Hayderi also independently gave evidence that Mr Hayderi's sister is a friend of her mother, and that his sister called her other to discuss them getting married.
19. The difficulty with this matter, as with many from this region, is determining whether inconsistencies in the evidence are a result of fabrication or whether they are the result of the difficulty or impossibility of obtaining documents required by the visa application process or difficulty with the English language.
20. While these matters are always finely balanced, and in this case I prefer the oral evidence given by independently by the parties with the assistance of an interpreter to any of the documentary evidence. I am satisfied that Mr Hayderi has genuine fear for the safety of Miss Hayderi and Nawid. I am satisfied that this concern shows a relationship exists between himself and Miss Hayderi and this supports his claim they are married and that Nawid is his son.
21. While I am not satisfied that any of the documents before me accurately reflect the dates of the events, on balance I am satisfied that Mr Hayderi and Miss Hayderi were married according to local law in a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

ARE THE OTHER REQUIREMENTS FOR A SPOUSAL RELATIONSHIP MET?

22. Financial aspects of the relationship

23. Miss Hayderi did not provide any information about pooling of financial resources with the visa application. There are no legal obligations owed to the other party.
24. Mr Hayderi provided to the tribunal a letter which is on a letterhead Qasumi Exchange with an address in Victoria. This states Mr Hayderi provides money to Nazanin Hayderi with an average monthly amount of \$200.00 since November 2014.
25. Mr Hayderi said he does not have any receipts for individual transactions as he had thrown them away, so he went back to the money exchange and they provided him with a letter. Miss Hayderi and Mr Hayderi gave consistent evidence about the process of transferring money, in that Miss Hayderi needs a receipt number provided by Mr Hayderi to access the money.
26. On being asked why he had only provided evidence of financial support to Miss Hayderi from November 2014, Mr Hayderi said he had provided two letters. The decision of the delegate states no information was provided about the financial support of Miss Hayderi. Mr Hayderi said at hearing that two letters about financial support were sent from Setera to Dubai. On it being observed were no other letters from a money exchange could be located on the tribunal file or the Department file, Mr Hayderi said that he received a request asking for

evidence of any money transfers, a police check and telephone records. He says he was in Afghanistan and when he returned to Australia the decision had been made so he cancelled the request for these documents.

27. I asked him why he had said that he had provided other evidence of financial support when he now said that he had not provided these documents. Mr Hayderi said he had thought he did provide these documents but then remembered he had not. I found this aspect of Mr Hayderi's evidence unreliable, and reflected his strong motivation to provide whatever information was sought.
28. However the parties did give consistent information about the amount of money transferred and the method of transfer and I am satisfied Mr Hayderi provides financial support to Miss Hayderi and Nawid.
29. In regard to accommodation costs, both Mr Hayderi and Miss Hayderi said she lives in a house he previously rented but now owns. They both gave evidence that Miss Hayderi lived there after they married with her sister and mother, but now her sister is married and she lives with her mother.
30. *Nature of the household*
31. Mr Hayderi and Miss Hayderi say they are the parents of Nawid, who according to the birth registration was born on 30 December 2010. Miss Hayderi said he was born early, but did not know how early he was born.
32. Mr Hayderi was offered the opportunity to provide DNA evidence to establish his paternity of Nawid. At hearing he said he would obtain a DNA test, however later said he could not. Samples for DNA testing cannot be taken in Kabul, and Miss Hayderi and Nawid would have to travel to Islamabad to have samples taken. Mr Hayderi said this is too dangerous for Miss Hayderi and Nawid, and also that he holds their passports with him in Australia. He says his own passport has expired so he cannot travel to Afghanistan to accompany them. He says he asked a neighbour to accompany them to Islamabad but he refused as he considered the journey too dangerous. In these circumstances, where it may be dangerous to travel to obtain the test, I do not draw any conclusions from the failure to provide this information.
33. From the time he says he was married, Mr Hayderi has been out of Australia between 4 March 2010 to 31 August 2010, 12 July 2011 to 19 November 2011, 4 May 2012 to 4 September 2013, 15 May 2014 to 15 August 2014 and 19 January 2015 to 20 April 2015. He says in these times he lives at his house with Miss Hayderi. He said they shop for food together or Miss Hayderi shops. Miss Hayderi says Mr Hayderi shops for food. Miss Hayderi does the housework.
34. Mr Hayderi's regular visits outside Australia to stay with Miss Hayderi support them being in a genuine and continuing relationship.
35. *Social aspects of the relationship*
36. Miss Hayderi provided two statutory declarations in support of the relationship being genuine and continuing, one from Ali D Haydari and one from Marzia Haidari, both of the same address. Both state they have known Mr Hayderi for their whole life as they are from the same village. They both state they have known Miss Hayderi for about a year. Marzia Haidari says she believes the relationship is genuine and continuing because they have a

child and it is uncommon to divorce after having a child. Mr Hayderi says he believes it is genuine and continuing because it is a cultural thing.

37. The parties both state the marriage was arranged by Mr Hayderi's sister and Miss Hayderi's mother. Miss Hayderi says he mother attended the wedding. Some photographs were provided of the wedding and of Nawid's birthday.
38. On balance, I find that the relationship is recognised by family and friends and that they undertake joint social activities.
39. *Nature of the commitment to each other*
40. Miss Hayderi could accurately identify that Mr Hayderi works as a driving instructor and that he works seven days. Mr Hayderi says the talk to each other on Tango or Viber and they do not have any regular time they speak but that it is every day or every three days. He provides photographs of mobile telephone screens. The telephone is an Australian telephone and shows calls to and from Reza Hayderi. He said these are photographs of his phone and says it shows the telephone Miss Hayderi calls from is registered in his name. I do not consider these photographs establish who was calling Mr Hayderi.
41. Miss Hayderi could identify the nature of Mr Hayderi's work and how long he has done this work. She gave consistent evidence that his parent had died and that he had a sister called Zarafshan. She could not name his parents. Miss Hayderi did not know how Mr Hayderi came to be in Australia. Mr Hayderi could accurately name Miss Hayderi's parents and sister, and identified that her sister had married and had moved out of the house he owns. Miss Hayderi could not identify the names of the people who Mr Hayderi lives with in Adelaide, but did identify that he had moved away from his sister. They both gave consistent evidence that Miss Hayderi's mother would live with her sister if Miss Hayderi and Nawid come to Australia.
42. I found Mr Hayderi's concern about Miss Hayderi and Nawid's safety and welfare evidence of the commitment he has to them and their wellbeing. In balance I am satisfied they speak to each other regularly and provide each other companionship and emotional support.
43. **Conclusion on whether Mr Hayderi and Miss Hayderi are spouses**
44. Having considered the factors in r.1.15A(3) I am satisfied that Mr Hayderi and Miss Hayderi have a mutual commitment to a shared life to the exclusion of all others, their relationship is genuine and continuing and that they do not live separately and apart on a permanent basis.
45. Given these findings I am satisfied that at the time the visa application was made and the time of this decision the parties were in a spousal relationship.
46. Therefore Miss Hayderi meets cl.309.211, and her visa application will be remitted for reconsideration by the Minister to consider the remaining criteria for a Subclass 309 visa. As Miss Hayderi meets these criteria, Nawid may meet the secondary criteria for the visa, and his application is also remitted for reconsideration.

DECISION

47. The Tribunal remits the applications for Partner (Provisional) (Class UF) visas for reconsideration, with the direction that the first named visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa:

- cl.309.211 of Schedule 2 to the Regulations.

Kate Millar
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).